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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD T. REGAN, SECRETARY,
DEPARTMENT OF THE TREASURY, PETITIONER

v.

COMMONWEALTH OF PUERTO RICO

DONALD T. REGAN, SECRETARY OF THE
TREASURY, PETITIONER

v.

VIRGIN ISLANDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether suits by Puerto Rico and the Virgin Islands for declaratory judgments with respect to taxes and for gasoline excise taxes and customs duties collected by the Secretary of the Treasury are barred by sovereign immunity and the tax exception to the Declaratory Judgment Act, 28 U.S.C. (& Supp. III) 2201–2202.

2. Whether any part of Puerto Rico's and the Virgin Islands' claims are barred by the statute of limitations, 28 U.S.C. 2401(a).

3. Whether, in the event judgment is entered in favor of Puerto Rico and the Virgin Islands, the court of appeals erred in ordering the establishment of an interest-bearing escrow account for the deposit of the gasoline excise taxes and customs duties on petroleum products at issue and the payment of the interest from such account to the prevailing party, where there is no statutory authority requiring the United States either to post security or to pay interest in these circumstances.

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VIRGIN ISLANDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these cases, but only if the Court grants the petitions for writs of certiorari which the Commonwealth of Puerto Rico and the Virgin Islands have filed in *Commonwealth of Puerto Rico* v. *Regan*, No. 80–1252, and in *Virgin Islands* v. *Regan*, No. 80–1253.[1]

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[1] This combined petition is filed in these cases under Rule 19.4 of this Court's Rules because several issues raised in each case are identical.

OPINIONS BELOW

The memorandum opinions of the district court in the Puerto Rico case (P.R. Pet. App. 44a–58a)[2] and in the Virgin Islands case (V.I. Pet. App. 66a–78a)[3] are not officially reported. The opinion of the court of appeals in both cases with respect to the gasoline tax issue (P.R. Pet. App. 1a–41a; V.I. Pet. App. 23a–63a) is not yet reported. The opinion of the court of appeals in the Virgin Islands case with respect to customs duties (V.I. Pet. App. 1a–22a) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered in these cases on October 17, 1980 (App. A, *infra*, 3a–6a). Timely petitions for rehearing with suggestions for rehearing en banc were denied on December 18, 1980 (P.R. Pet. App. 59a–62a; V.I. Pet. App. 96a–98a). By orders dated March 13, 1981, the Chief Justice extended the time within which the Secretary could file a petition for a writ of certiorari to and including April 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

The pertinent provisions of 28 U.S.C. (& Supp. III) 1331, 1340, 1361, 2201, 2202, 2401, and 2408, and of Rule 62, Fed. R. Civ. P., are set forth in App. B, *infra*, 18a–20a.

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[2] "P.R. Pet. App." refers to the appendix to the petition in *Commonwealth of Puerto Rico* v. *Regan*, No. 80–1252. "P.R. C.A. App." refers to the joint appendix filed in the court of appeals.

[3] "V.I. Pet. App." refers to the appendix to the petition in *Virgin Islands* v. *Regan*, No. 80–1253. "V.I. C.A. App." refers to the joint appendix filed in the court of appeals.

STATEMENT

1. *The Puerto Rico case.* Puerto Rico brought this action against the Secretary of the Treasury[4] in the United States District Court for the District of Columbia for a judgment declaring that the excise tax collected by the Secretary of the Treasury, pursuant to 26 U.S.C. 4081–4083, on gasoline refined in Puerto Rico is to be covered into the treasury of Puerto Rico under 26 U.S.C. 7652(a)(3), and for an order compelling the Secretary to cover into the treasury of Puerto Rico the amount of those taxes previously collected and to be collected in the future on the sale of such gasoline in the United States (P.R. Pet. App. 5a).

During the fiscal year 1956–1957, Puerto Rican manufacturers began to refine gasoline and ship it to the United States. The sale of this gasoline was subject to a tax that has been levied since 1932 on gasoline sold in the United States. Revenue Act of 1932, ch. 209, Section 617, 47 Stat. 266 (now Sections 4081–4083 of the Internal Revenue Code of 1954 (26 U.S.C.)). None of the revenues derived from the tax on the sale in the United States of gasoline refined in Puerto Rico has been covered over to Puerto Rico (P.R. Pet. App. 4a).

By letter to the Secretary dated September 13, 1974, Puerto Rico for the first time requested of the Secretary of the Treasury that both past and future taxes collected, under the provisions of the Internal Revenue Code of 1954, on the sale of gasoline refined in Puerto Rico be covered into the treasury of Puerto Rico. In support of this request, Puerto Rico cited Section 7652(a)(3) of the Code as establishing its entitlement to

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[4] When this action was instituted, the named defendant, then Secretary of the Treasury, was William E. Simon. Pursuant to Rule 25(d), Fed. R. Civ. P., Rule 43(c), Fed. R. App. P., and Rule 40.3 of the Rules of this Court, his successors as Secretary of the Treasury have automatically been substituted.

the funds generated by the taxes. The Secretary rejected this request on June 10, 1975 (P.R. Pet. App. 4a–5a).

Puerto Rico thereupon brought this action on June 26, 1975. The Secretary moved to dismiss on the grounds that the action was barred under the doctrine of sovereign immunity and by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201 (P.R. C.A. App. 7, 72). In an unpublished order, the district court denied this motion (App. A, *infra*, 10a). In his answer, the Secretary also alleged that part of Puerto Rico's claim was barred by the statute of limitations, 28 U.S.C. 2401(a) (P.R. C.A. App. 132, 136).

The district court held that under Section 7652(a)(3) of the Code, Puerto Rico was entitled to the excise tax collected by the Secretary on the sale in the United States of gasoline refined in Puerto Rico, but limited Puerto Rico's recovery of the past tax revenues—under the doctrine of laches—to those taxes collected after September 13, 1974, when Puerto Rico first presented its claim to the Secretary. In the district court's view of the matter, such a limitation of Puerto Rico's recovery was justified by the fact that it had slept on its rights and had thus lulled Congress into thinking that Puerto Rico was not entitled to the gasoline tax under Section 7652(a)(3) (P.R. Pet. App. 5a, 7a; 44a–58a).

On appeal by both Puerto Rico and the Secretary, the court of appeals reversed on the merits (P.R. Pet. App. 1a–41a). It held that Puerto Rico was not entitled to the revenues from the sale of gasoline refined in Puerto Rico. In so ruling, the court did not discuss the Secretary's claim that Puerto Rico's suit was barred by sovereign immunity, the tax exception to the Declaratory Judgment Act, the statute of limitations, and laches (*id.* at 40a).

2. *The Virgin Islands case.* The Virgin Islands brought a similar action to the same district court for a

declaratory judgment: (1) that the excise tax collected by the Secretary of the Treasury since 1966, pursuant to 26 U.S.C. 4081–4083, on gasoline refined in the Virgin Islands is to be covered into the treasury of the Virgin Islands under 26 U.S.C. 7652(b)(3); (2) that the customs duties collected on articles coming into the United States from the Virgin Islands should be covered into the treasury of the Virgin Islands under Section 28(a) of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508; and (3) that oil import license fees imposed by Presidential Proclamation No. 4210, Apr. 19, 1973, 38 Fed. Reg. 9645, 9648–9649 (1973), as amended, under Trade Expansion Act of 1962, Pub. L. No. 87–794, Section 232(b), 76 Stat. 877, 19 U.S.C. 1862(b), are customs duties, and that those fees imposed upon the shipment of petroleum products from the Virgin Islands into the United States should likewise be covered into the treasury of the Virgin Islands under Section 28(a) of the Revised Organic Act of the Virgin Islands. In addition, the Virgin Islands sought an order compelling the Secretary to pay over to the Virgin Islands those taxes and customs duties collected in the past and to be collected in the future. None of the taxes on the sale of gasoline refined in the Virgin Islands, the customs duties collected on items coming into the United States from the Virgin Islands, or the oil import license fees imposed upon the shipment of petroleum products from the Virgin Islands have been covered into the Virgin Islands' treasury (V.I. Pet. App. 3a n.3, 4a n.5, 66a–67a).

The Virgin Islands had presented the Secretary with a claim for those amounts on November 18, 1974. The Secretary rejected this claim on February 6, 1976. The Virgin Islands thereupon instituted this action in the district court on May 21, 1976. In his answer, the Secretary claimed that the court had no jurisdiction because the suit was barred by the doctrine of sovereign immunity and the tax exception to the Declaratory Judgment Act,

28 U.S.C. 2201. The Secretary also alleged in his answer that part of the Virgin Islands' claim was barred by the statute of limitations (V.I. C.A. App. 7, 16, 19, 20).

The district court determined that with respect to the gasoline tax, the Virgin Islands' claim was virtually identical to Puerto Rico's claim. Accordingly, for the reasons given in its decision in the Puerto Rico case, the district court ruled that the Virgin Islands was entitled to the tax collected upon the sale of gasoline refined in the Virgin Islands (V.I. Pet. App. 67a). The district court also held that the Virgin Islands was entitled to the customs duties collected on items coming into the United States from the Virgin Islands, but further held that the oil import license fees are not customs duties and therefore are not subject to the Virgin Islands' claim (V.I. Pet. App. 66a–77a). The district court did not discuss the Secretary's jurisdictional defenses, which included the statute of limitations.

3. On appeal by both the Secretary and the Virgin Islands, the court of appeals reversed (V.I. Pet. App. 1a–63a). In the same opinion resolving the claims of Puerto Rico to the gasoline tax, the court held that the Virgin Islands was not entitled, under 26 U.S.C. 7652(b)(3), to the revenue from the sale in the United States of gasoline refined in the Virgin Islands. In so holding, the court did not discuss the Secretary's jurisdictional defenses to the suit (V.I. Pet. App. 23a–63a). In a separate opinion, the court held that the Virgin Islands was not entitled under Section 28(a) of the Revised Organic Act of the Virgin Islands to the customs duties on dutiable items coming into the United States from the Virgin Islands and pretermitted discussion of whether the oil import license fees were customs duties (V.I. Pet. App. 1a–22a).

4. Following the entry of the district court's judgments, the Secretary, out of an abundance of caution, moved to stay the judgments in both cases. The district

court denied stays on the ground that the matter should be considered by the court of appeals (App. A, *infra*, 11a, 16a). On the Secretary's applications for stays in the court of appeals, the court of appeals denied the Secretary's requests on February 12, 1979. Instead, it ordered the establishment of interest-bearing escrow accounts into which four cents per gallon on each gallon of gasoline brought into the United States from Puerto Rico or from the Virgin Islands and the customs duties on petroleum products produced in the Virgin Islands would be placed from the date of the respective judgments. The court's orders provided that, upon its decisions becoming final, the amounts in each fund plus interest thereon would be distributed to the party to whom the court ordered the amounts payable (App. A, *infra*, 8a–9a, 14a–15a). The Secretary moved the court to reconsider the conditions of its stay orders (App. A, *infra*, 1a–2a). Since the court of appeals reversed on the merits, it declined to rescind its orders with respect to the stay orders, observing that its decision on the merits rendered the stay orders moot (P.R. Pet. App. 43a–44a n.34; V.I. Pet. App. 62a–63a n.34).

REASONS FOR GRANTING THE PETITION

Both the Commonwealth of Puerto Rico and the Virgin Islands have filed petitions for writs of certiorari (Nos. 80–1252 and 80–1253) seeking review of the judgments below that they are not entitled to the gasoline excise taxes collected by the Secretary of the Treasury on gasoline sold within the United States and refined within their jurisdictions. The Virgin Islands also seeks review of the decision below holding that it is not entitled to certain customs duties and oil import fees. The Secretary intends to oppose the granting of those petitions. If those petitions are granted, however, the Court should also grant the present petition in order to preserve the Secretary's right to defend the court of ap-

peals' judgments on the basis of the alternative jurisdictional contentions not addressed by the court below and to consider other important issues involved in these cases.[5]

1. Although the court of appeals did not discuss the jurisdictional issues raised by the Secretary, this Court has recognized that the first and fundamental question is that of jurisdiction (*Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884)) and that it has an obligation to consider, even *sua sponte*, whether the district court had jurisdiction to decide the case (*Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 278 (1977)). We submit that the district court was without jurisdiction to hear these cases and grant the relief requested.

It is well established that the United States, as sovereign, may not be sued without its consent and that the terms of its consent define the Court's jurisdiction. *E.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500–501 (1940).

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[5] Although it would appear that a cross-petition is not necessary in order to raise an argument which does not seek to alter the judgments of the court of appeals, we are filing this conditional cross-petition out of an abundance of caution. See *Langnes* v. *Green*, 282 U.S. 531 (1931). Cf. *Strunk* v. *United States*, 412 U.S. 434 (1973); *NLRB.* v. *Internat'l Van Lines*, 409 U.S. 48, 52 & n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, a cross-petition would not appear to be necessary where the objection to be raised is that the lower courts had no jurisdiction to consider that case. See *Peoria Ry.* v. *United States*, 263 U.S. 528, 535–536 (1924); *Mattingly* v. *N.W. Va. R.R.*, 158 U.S. 53, 57 (1895). See also *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359 (1932); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

When an officer of the sovereign is sued, the general rule is that the suit is against the sovereign if "'the judgment sought would expend itself on the public treasury or domain, or interfere with public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, * * * [337 U.S. 682], at 704 [1949]." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). See also *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *Louisiana* v. *McAdoo*, 234 U.S. 627, 633 (1914). The exceptions to this rule are "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Malone* v. *Bowdoin*, * * * [369 U.S. 643], at 647 [1962]." *Dugan* v. *Rank*, *supra*, 372 U.S. at 621–622. But these exceptions are inapplicable where the requested order would require affirmative action by the sovereign or affect the disposition of sovereign property. *Hawaii* v. *Gordon*, *supra*, 373 U.S. at 58; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

These actions are clearly barred by the doctrine of sovereign immunity. Although these suits are nominally against the Secretary of the Treasury, respondents seek judgments that would expend themselves on the public treasury and that would require affirmative action by the sovereign. Moreover, none of the exceptions to the doctrine of sovereign immunity is applicable.

Respondents have made no showing that the sovereign has waived its consent to be sued. In the courts below, respondents urged that the jurisdiction of the district court rested on the Administrative Procedure Act (5 U.S.C. 701–706), D.C. Code § 11–521(a)(1) and (2) (1967), and 28 U.S.C. (& Supp. III) 1331, 1340, 1361 and 2201. In *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977),

this Court held that the Administrative Procedure Act, 5 U.S.C. 701–706, does not constitute a "grant of subject-matter jurisdiction to review agency actions." Moreover, 28 U.S.C. (Supp. III) 1331(a) (App. B, *infra*, 18a), conferring subject matter jurisdiction on the district courts over civil actions where the matter arises under the Constitution, laws or treaties of the United States, does not constitute consent by the United States to be sued.[6] And 28 U.S.C. 1361 (App. B, *infra*, 18a–19a), which grants the district courts jurisdiction over any action in the nature of mandamus to compel an officer or employee of any agency to perform a duty owed to the complainant, does not lift the bar of sovereign immunity and permit a district court to entertain an action which, though nominally against an officer of the United States, is in reality against the government itself.[7] Similarly, 28 U.S.C. 1340 (App. B, *infra*, 18a), relating to jurisdiction in tax and customs duty cases, is not a waiver of sovereign immunity.[8]

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[6] *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978); *American Science & Engineering, Inc.* v. *Califano*, 571 F.2d 58, 63 (1st Cir. 1978); *Commonwealth of Kentucky ex rel. Hancock* v. *Ruckelshaus*, 362 F. Supp. 360, 367–368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), aff'd *sub nom. Hancock* v. *Train*, 426 U.S. 167 (1976). But cf. *Ryan* v. *Federal Deposit Insurance Corp.*, 565 F.2d 763 (D.C. Cir. 1977).

[7] *Estate of Watson* v. *Blumenthal*, *supra*, 586 F.2d at 935; *Essex* v. *Vinal*, 499 F.2d 226, 231–232 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); *Commonwealth of Kentucky ex rel. Hancock* v. *Ruckelshaus*, *supra*, 362 F. Supp. at 368; *Smith* v. *Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir.), cert. denied, 429 U.S. 980 (1976).

[8] *Essex* v. *Vinal*, *supra*. Nor is sovereign immunity waived by D.C. Code § 11–521(a)(1) and (2) (1967), which confers upon the district court jurisdiction over civil actions between parties where both are residents of the District of Columbia or where an offense is committed in the District of Columbia.

Finally, the Declaratory Judgment Act (28 U.S.C. (Supp. III) 2201, App. B, *infra*, 19a) specifically denies jurisdiction to the federal courts with respect to declaratory judgments in actions involving federal taxes. These actions indisputably involve federal taxes, *viz.*, gasoline excise taxes collected by the Secretary of the Treasury pursuant to 26 U.S.C. 4081–4083, and customs duties. *Akins* v. *Saxbe*, 380 F. Supp. 1210, 1217–1218 (D. Me. 1974). Moreover, this statute does not constitute a waiver of sovereign immunity. *Anderson* v. *United States*, 229 F.2d 675 (5th Cir. 1956); *Brownell* v. *Ketcham Wire & Mfg. Co.*, 211 F.2d 121 (9th Cir. 1954); *Commonwealth of Kentucky ex rel. Hancock* v. *Ruckelshaus*, 362 F. Supp. 360, 368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), aff'd *sub nom. Hancock* v. *Train*, 426 U.S. 167 (1967).

In sum, there is no statute conferring jurisdiction on the district court to hear these suits against the sovereign. Indeed, the suits with respect to the tax claims are specifically barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. (Supp. III) 2201. The courts below therefore erred in reaching the merits in these cases.

2. Even assuming that the district court had jurisdiction to hear these suits and that the court of appeals erred in ruling against Puerto Rico and the Virgin Islands with respect to the merits, at least part of their claims are barred by the six-year statute of limitations of 28 U.S.C. 2401(a) (App. B, *infra*, 19a). That statute provides that "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." It is applicable in actions, such as these cases, where equitable relief is sought (*Oppenheim* v. *Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978); *Werner* v. *United States*, 188 F.2d 266 (9th Cir. 1951); *Screven* v. *United States*, 207 F.2d 740 (5th Cir. 1953)); where,

even though the United States is not a named party, the relief sought would be possible only by resort to the federal fisc (*Saffron* v. *Department of the Navy*, 561 F.2d 938, 941–942 (D.C. Cir. 1977), cert. denied, 434 U.S. 1033 (1978)); or where official action of a federal official is challenged (*Oppenheim* v. *Campbell*, *supra*). This statute of limitations is jurisdictional. Unless the claim is brought within the time limit within which the sovereign has consented to be sued, the court is without jurisdiction to provide relief regardless of whom the plaintiff might be. *United States* v. *Seminole Nation*, 299 U.S. 417, 421 (1937); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 510 (1967); *Finn* v. *United States*, 123 U.S. 227, 232 (1887); *Christian Beacon* v. *United States*, 322 F.2d 512, 514 (3d Cir. 1963).

Puerto Rico claims (P.R. Pet. 3) entitlement to taxes collected by the Secretary since 1956 on the sale in the United States of gasoline refined in Puerto Rico. Section 7652(a)(3) of the Code, upon which Puerto Rico's claim is based, provides for the covering over of internal revenue taxes collected "on articles produced in Puerto Rico and transported to the United States." The right of action for covering over of any tax thus accrued when the taxes were collected. Yet, Puerto Rico did not file this suit until June 26, 1975. Accordingly, the statute of limitations bars relief with respect to gasoline excise taxes collected prior to June 26, 1969.[9]

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[9] The district court determined that Puerto Rico's right to the taxes on gasoline collected prior to September 13, 1974 was cut off under the doctrine of laches (P.R. Pet. App. 56a–58a). Hence, under the district court's disposition, it was unnecessary to address the statute of limitations defense. That defense would be applicable only if the district court's ruling with respect to laches were erroneous. However, neither Puerto Rico nor the Secretary has asked this Court to consider the district court's determination with respect to laches.

The Virgin Islands suit is subject to the same defense. It did not file its complaint until May 21, 1976. Its cause of action with respect to customs duties arises, if at all, when the Treasury failed to pay over the appropriate customs duties. The claim for amounts collected prior to May 21, 1970, is therefore barred by the statute of limitations. Section 7652(b)(3)(A) of the Code calls for the payment of taxes covered over by Section 7652(b)(3) of the Code at the end of the fiscal year. Accordingly, the statute of limitations bars relief with respect to the Virgin Islands' claim for gasoline excise taxes collected during the fiscal year ended June 30, 1969, and prior years.

3. The court of appeals likewise erred in denying the Secretary's stay applications in these cases and requiring the establishment of interest-bearing escrow accounts and the payment of both principal and interest to the prevailing party. The Secretary sought these stays out of an abundance of caution. The court of appeals had no authority to impose the condition of the interest-bearing escrow accounts.

Provisions of the United States Code have long established that security for damages or costs shall not be required of the federal government on the institution or prosecution of any proceeding. 28 U.S.C. 2408 (App. B, *infra*, 19a–20a) provides in pertinent part that "[s]ecurity for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding." These provisions are reflected also in Fed. R. Civ. P. 62(d) and (e) (App. B, *infra*, 20a) providing that no bond, obligation, or other security shall be required when an appeal is taken by the United States or any officer or agency thereof. The statutory provisions are applicable both where the United States or its representative initiates

a proceeding (*Black Diamond Steamship Corp.* v. *Stewart & Sons, Ltd.*, 336 U.S. 386, 394–395 (1949); *Brown* v. *Beckham*, 137 F.2d 644 (6th Cir. 1943)), or where the United States or its representative is the appellant or defendant (*Pacific Bank* v. *Mixter*, 114 U.S. 463 (1885); *In re New York Investors, Inc.*, 79 F.2d 179, 182 (2d Cir. 1935); *Utah* v. *Livsey*, 312 F. Supp. 1397, 1400 (D. Utah 1970)).

Furthermore, the effect of these orders was to require the United States to pay interest on a recovery without authority of any statute. The rule is well established that interest may not be collected on judgments against the United States unless expressly authorized by statute. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658–659 (1947); *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *Maryland*, 349 F.2d 693 (D.C. Cir. 1965); Annot., 24 A.L.R. 2d 928, 985–993 (1952). This principle has been applied when the suit is nominally against a federal official, but the relief sought would directly impinge on the federal treasury. *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 (1888); *Fitzgerald* v. *Staats*, 578 F.2d 435, 438–439 (D.C. Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977). See also *Steiner* v. *Nelson*, 309 F.2d 19 (7th Cir. 1962).

Although the decisions in favor of the Secretary made it unnecessary for the court below to consider the Secretary's motions for reconsideration of the stay orders (P.R. Pet. App. 40a–41a n.34; V.I. Pet. App. 62a–63a n.34), the Court should have before it the court of appeals' action with respect to the Secretary's motions for stay if the petitions in these cases are granted.

CONCLUSION

This petition for a writ of certiorari should be granted, but only if the Court grants the petitions filed

by the Commonwealth of Puerto Rico and the Virgin Islands in Nos. 80–1252 and 80–1253. If the Court denies those petitions, as we urge, it should also deny this petition.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 79–1020
79–1024

COMMONWEALTH OF PUERTO RICO,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY,
DEFENDANT-APPELLANT-CROSS-APPELLEE

Nos. 79–1021
79–1022

VIRGIN ISLANDS,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY,
DEFENDANT-APPELLANT-CROSS-APPELLEE

MOTION BY THE APPELLANT-CROSS-APPELLEE TO MODIFY STAY ORDERS OF FEBRUARY 12, 1979

Comes now, W. Michael Blumenthal, Secretary of the Treasury, appellant and cross-appellee in the cap-

tioned cases, by his attorney, and respectfully moves this court to modify the stay orders issued on February 12, 1979, in the captioned cases, so as to eliminate the provisions in paragraph numbered 1 of the order in the Puerto Rican case and paragraphs numbered 1 and 2 in the Virgin Islands case that funds deposited in the escrow accounts therein provided for bear interest, and to eliminate the provisions in paragraph numbered 3 of the order in the Puerto Rican case and paragraph numbered 4 of the order in the Virgin Islands case that accumulated interest, in addition to such portions, if any, of the escrow funds to which the plaintiff-appellees may be found to be entitled, be paid to the plaintiff-appellees. We further request that the Court act on this motion at the time it decides the merits of these cases. The grounds for the motion are set forth in the attached memorandum, which is incorporated herein by reference.

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: /s/_____
ERNEST J. BROWN,
Special Litigation Counsel
Tax Division
Department of Justice,
Washington, D.C. 20530.
Counsel for the Appellant-
Cross-Appellee
(202) 633-3362

Dated: July 23, 1979

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980.

Civil Action No. 75–1035

No. 79–1020

COMMONWEALTH OF PUERTO RICO

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY, APPELLANT

Civil Action No. 76–0916

79–1021

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY, APPELLANT

Civil Action No. 75–1035

79–1024

COMMONWEALTH OF PUERTO RICO, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Filed: October 17, 1980)

Before: McGOWMAN and WALD, *Circuit Judges, and* JOHN PRATT*, *United States District Judge for the District of Columbia*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court on appeal herein in No. 79–1020 and the judgment on appeal in No. 79–1021, insofar as they pertain to the covering over of revenues derived from the taxation of gasoline refined in Puerto Rico and the Virgin Islands and transported to the United States, are reversed, and the cases are remanded with directions to enter judgment in favor of the United States, all in accordance with the opinion of this Court filed herein this date. In light of such disposition, it is not necessary to reach the merits of the appeal in No. 79–1024 and, accordingly, that appeal is dismissed as moot.

Per Curiam
For the Court

/s/ _____
GEORGE A. FISHER
Clerk

Date: October 17, 1980
Opinion for the Court filed by Circuit Judge McGowan

---

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 79–1021

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY, APPELLANT

CIVIL ACTION NO. 76–0916

79–1022

VIRGIN ISLANDS, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY

CIVIL ACTION NO. 76–0916

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DIST RICT OF COLUMBIA

(Filed October 17, 1980)

Before: MCGOWMAN and WALD, *Circuit Judges, and* JOHN PRATT*, *United States District Judge for the District of Columbia*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that, insofar as it pertains to customs duties, the judgment of the District Court on appeal herein is hereby vacated and these cases are remanded to the District Court with directions to enter judgment in favor of the Secretary of the Treasury, all in accordance with the opinion of this Court filed herein this date. Issues raised in Appeal No. 79–1021, dealing with the covering over of gasoline tax revenues to the Virgin Islands, are decided a separate opinion and judgment filed simultaneously herewith.

Per Curiam
For the Court

/s/ _____
GEORGE A. FISHER
Clerk

Date: October 17, 1980
Opinion for the Court filed by Circuit Judge Wald

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.

COMMONWEALTH OF PUERTO RICO,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

W. MICHAEL BLUMENTHAL,
DEFENDANT-APPELLANT-CROSS-APPELLEE

MOTION BY DEFENDANT-APPELLANT FOR STAY PENDING APPEAL OF DISTRICT COURT'S OCTOBER 7, 1978 ORDER

Defendant-Appellant W. Michael Blumenthal, Secretary of the Treasury, by his attorneys, hereby respectfully moves this Court for a stay of the District Court's final order dated October 7, 1978 in this action (D.C. D.C., No. 75–1035), and for the preservation of the *status quo* existing prior to the issuance of that order, pending appellate review of the case. The grounds for this motion are set forth in the attached supporting memorandum, which is incorporated herein by reference.

/s/ _____
MYRON C. BAUM
Deputy Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530
Counsel for the Defendant-Appellant
(202) 633-3362

Dated: January 2, 1979

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

No. 79–1020

COMMONWEALTH OF PUERTO RICO

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY, APPELLANT

Civil Action No. 75–1035

And Consolidated Case No. 79–1024

(Filed February 12, 1979)

BEFORE: BAZELON, TAMM and ROBINSON*, Circuit Judges

ORDER

On consideration of appellant's (W. Michael Blumenthal, Secretary, Department of the Treasury) motion for stay pending appeal, and of the responses thereto, it is

ORDERED by the Court that the aforesaid motion for stay of appeal is denied on the following conditions:

1. That defendant-appellant deposit in an interest bearing escrow account four (4) cents for each gallon of

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*Circuit Judge Robinson did not participate in the foregoing order.

gasoline transported from Puerto Rico to the United States between October 10, 1978 and the date on which a formal 48 U.S.C. §734 covering over procedure is instituted or on which an appellate decision reversing the District Court's October 7, 1978, order becomes final, whichever first occurs;

2. That defendant-appellant begin covering over current gasoline tax receipts pursuant to 48 U.S.C. §734 within a reasonable time, not to exceed sixty days, from the date of any final decision of appeal affirming, in whole, or in part, the October 7, 1978 order;

3. That, within sixty (60) days after any final decision on appeal, that portion of the escrow fund representing taxes to which plaintiff-appellee is found to be entitled (plus accumulated interest thereon) be paid over to Puerto Rico.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PUERTO RICO, PLAINTIFF,

v.

WILLIAM E. SIMON, DEFENDANT.

Civil Action No. 75–1035

ORDER

Upon consideration of defendant's Motion to Dismiss and memoranda in support thereof; plaintiff's opposition thereto and memoranda in support thereof; and oral argument of counsel, it is this 31st day of October, 1975,

ORDERED that defendant's Motion to Dismiss be, and it hereby is, denied; and it is further

ORDERED that discovery shall proceed forthwith, subject to the Court's entertaining appropriate motions to limit the scope of discovery; and it is further.

ORDERED that thirty (30) days after the defendant produces the documents requested by plaintiff in "Plaintiff's First Request for Production of Documents by Defendant", filed on July 25, 1975, this matter shall be heard by the Court on cross-motions for summary judgment. The appropriate motions and memoranda of law shall be filed not later than ten (10) days prior to the date of such hearing.

/s/ _____

OLIVER GASCH
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PUERTO RICO, PLAINTIFF,

v.

W. MICHAEL BLUMENTHAL, DEFENDANT.

Civil Action No. 75–1035

ORDER

Upon consideration of plaintiff's motion for stay pending appeal of this Court's Order of October 7, 1978, the memoranda filed in support thereof and opposition thereto, and it appearing to the Court that it is preferable to have the Court of Appeals have complete control over the scheduling, briefing, and hearing of cases on appeal, and it further appearing to the Court that it is in the interests of justice and judicial economy that the Court of Appeals determine the need for a stay in this matter, it is by the Court this 22nd day of December, 1978,

ORDERED that plaintiff's motion for stay pending appeal be, and hereby is, denied.

/s/ _____
OLIVER GASCH
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PUERTO RICO, PLAINTIFF,

v.

W. MICHAEL BLUMENTHAL, DEFENDANT.

Civil Action No. 75-1035

ORDER

The Court's Order of December 22, 1978, filed January 2, 1979, is hereby amended in the following respect: Each time the word "plaintiff's" appears, it shall be stricken and the word "defendant's" shall be inserted in its place.

It is SO ORDERED.

/s/ _____
OLIVER GASCH
Judge

Dated: Jan. 6th, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.

VIRGIN ISLANDS,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

W. MICHAEL BLUMENTHAL, DEFENDANT-APPELLANT-CROSS-APPELLEE

MOTION BY DEFENDANT-APPELLANT FOR STAY PENDING APPEAL OF DISTRICT COURT'S OCTOBER 11, 1978 ORDER

Defendant-Appellant W. Michael Blumenthal, Secretary of the Treasury, by his attorneys, hereby respectfully moves this Court for a stay of the District Court's final order dated October 11, 1978 in this action (D.C. D.C., No. 76-0916), and for the preservation of the *status quo* existing prior to the issuance of that order, pending appellate review of the case. The grounds for this motion are set forth in the attached supporting memorandum, which is incorporated herein by reference.

/s/ _____
MYRON C. BAUM
Deputy Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530
Counsel for the Defendant-Appellant
(202) 633-3362.

Dated: January 2, 1979

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

No. 79-1021

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, SECRETARY,
DEPARTMENT OF THE TREASURY, APPELLANT

And Consolidated Case No. 79–1022

Civil Action No. 76–0916

Filed: February 12, 1979

BEFORE: BAZELON, TAMM and ROBINSON*, Circuit Judges

ORDER

On consideration of appellant's (W. Michael Blumenthal, Secretary, Department of Treasury) motion for stay pending appeal, and of the responses thereto, it is

ORDERED by the Court that the aforesaid motion for stay pending appeal is denied on the following conditions:

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*Circuit Judge Robinson did not participate in the foregoing order.

1. That defendant-appellant deposit in an interest bearing escrow account four (4) cents for each gallon of gasoline transported from the Virgin Islands to the United States between October 11, 1978 and the date on which a formal 26 U.S.C. §7652 covering over procedure is instituted or on which an appellate decision reversing the District Court's October 11, 1978 order becomes final, whichever first occurs;

2. That defendant-appellant deposit in an interest bearing escrow account an amount equivalent to the customs duties on petroleum products produced in the Virgin Islands, and collected by the United States between October 11, 1978 and the date on which a formal 48 U.S.C. §1642 covering over procedure is instituted or on which an appellate decision reversing the District Court's October 11, 1978 order becomes final, whichever first occurs,

3. That defendant-appellant begin covering over current gasoline tax receipts pursuant to 26 U.S.C. §7652 and customs duties pursuant to 48 U.S.C. §1642 within a reasonable time, not to exceed sixty (60) days from the date of any final decision on appeal affirming, in whole or in part, the October 11, 1978 order, and

4. That, within sixty (60) days after any final decision on appeal, that portion of the escrow fund representing taxes and customs duties to which plaintiff-appellee is found to be entitled (plus accumulated interest thereon) be paid over to the Virgin Islands.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0916

VIRGIN ISLANDS, PLAINTIFF,

v.

W. MICHAEL BLUMENTHAL, DEFENDANT.

ORDER

Upon consideration of plaintiff's motion for stay pending appeal of this Court's Order of October 11, 1978, the memoranda filed in support thereof and opposition thereto, and it appearing to the Court that it is preferable to have the Court of Appeals have complete control over the scheduling, briefing, and hearing of cases on appeal, and it further appearing to the Court that it is in the interests of justice and judicial economy that the Court of Appeals determine the need for a stay in this matter, it is by the Court this 22nd day of December, 1978,

ORDERED that plaintiff's motion for stay pending appeal be, and hereby is, denied.

/s/ _____
OLIVER GASCH
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0916

VIRGIN ISLANDS, PLAINTIFF,

v.

W. MICHAEL BLUMENTHAL, DEFENDANT.

ORDER

The Court's Order of December 22, 1978, filed January 2, 1979, is hereby amended in the following respect: Each time the word "plaintiff's" appears, it shall be stricken and the word "defendant's" shall be inserted in its place.

It is SO ORDERED.

/s/ _____
OLIVER GASCH
Judge

APPENDIX B

28 U.S.C.:

§1331 [& Supp. III]. *Federal question; amount in controversy; costs.*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

* * * * *

§1340. *Internal revenue; customs duties.*

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§1361. *Action to compel an officer of the United States to perform his duty.*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§2201 [Supp. III]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an apppropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

§2401. *Time for commencing action against United States.*

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

* * * * *

§2408. *Security not required of United States.*

Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.

Costs taxable, under other Acts of Congress, against the United States or any such department, agency or party shall be paid out of the contingent

fund of the department or agency which directed the proceedings to be instituted.

Fed. R. Civ. P.:

Rule 62. *Stay of Proceedings to Enforce a Judgment*

* * * * *

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) *Stay in Favor of the United States or Agency Thereof.* When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

* * * * *

FILED
APR 17 1981
ALEXANDER L. STEVAS

No. 80-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD T. REGAN, SECRETARY
DEPARTMENT OF TREASURY, *Petitioner,*
v.
COMMONWEALTH OF PUERTO RICO, *Respondent.*

DONALD T. REGAN, SECRETARY
DEPARTMENT OF TREASURY, *Petitioner,*
v.
VIRGIN ISLANDS, *Respondent.*

RESPONDENTS' BRIEF IN RESPONSE TO CROSS-PETITION

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April 17, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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No. 80-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD T. REGAN, SECRETARY
DEPARTMENT OF TREASURY, *Petitioner,*
v.
COMMONWEALTH OF PUERTO RICO, *Respondent.*

DONALD T. REGAN, SECRETARY
DEPARTMENT OF TREASURY, *Petitioner,*
v.
VIRGIN ISLANDS, *Respondent.*

RESPONDENTS' BRIEF IN RESPONSE TO CROSS-PETITION

Petitioner recognizes that the petition in the captioned case is, in effect, a cross-petition for *certiorari* in *Commonwealth of Puerto Rico* v. *Regan*, No. 80-1252 and *Virgin Islands* v. *Regan*, No. 80-1253. Petn. at 1, 14-15. Although respondents are prepared to show that there is no merit in the Secretary's position on the questions set forth in his cross-petition, the Commonwealth of Puerto Rico and the Virgin Islands do not oppose Supreme Court review of those questions. The fact that the Secretary felt compelled to file a cross-petition on issues not considered by the Court of Appeals only serves to highlight the overall importance of these cases and to provide additional reason for granting the original petitions for *certiorari* filed by Puerto Rico and the Virgin Islands. Certainly, nothing in the Secretary's cross-petition is in any way inconsistent with the reasons for granting the writ advanced by Puerto Rico and the Virgin Islands.

Though respondents are content to await the briefs on the merits to respond to most of petitioner's arguments, we do wish to demonstrate now the frailty of the threshold arguments lest this Court be lulled into believing that is lacks jurisdiction over these cases.

a. Contrary to the Secretary's argument, the doctrine of sovereign immunity does not bar these actions. The October 21, 1976 amendments to the Administrative Procedure Act explicitly waive that defense in actions for declaratory and injunctive relief and mandamus. 5 U.S.C. §702, *as amended*. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6121. (Section 702 was amended "so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.") *See Sheehan* v. *Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980). And the waiver occasioned by the 1976 amendments is applicable to litigation pending at the time of their enactment. *Legal Aid Society of Alameda County* v. *Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Driver* v. *Helms*, 456 F. Supp. 496, 497, n. 1 (D.R.I. 1978). In addition, these cases fall within the well-established exception that an action against an officer of the federal government is not barred by sovereign immunity if the officer's challenged acts are *ultra vires*. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). Contrary to the Secretary's assertion, the relief sought by respondents will not require an affirmative act of the sovereign or the disposition of unquestionably sovereign

property, but only that the Secretary cease the unauthorized withholding of funds which Congress has appropriated and ordered to be covered into the treasuries of Puerto Rico and the Virgin Islands. *See City of Santa Clara* v. *Andrus*, 572 F.2d 660, 679 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1979); *Schafly* v. *Volpe*, 495 F.2d 273, 280 (7th Cir. 1974); *National Council of Community Mental Health Centers* v. *Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973); *Pennsylvania* v. *Lynn*, 362 F. Supp. 1363, 1368 (D.D.C. 1973), *rev'd on other grounds*, 501 F.2d 848 (D.C. Cir. 1974).

Furthermore, as the district court correctly concluded, the claims in these cases fall squarely within the traditional principles governing actions for mandamus. Indeed, this Court has itself, in a long line of cases, specifically affirmed the appropriateness of mandamus relief to compel federal officers to pay monies out of the public treasury, where the duty was clear and ministerial. *E.g., Houston* v. *Ormes*, 252 U.S. 469, 472 (1920); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386 (1902). The Secretary's cross-petition suggests that this line of cases was overruled by the dictum found in a footnote in *Larson* v. *Domestic and Foreign Commerce Corp., supra*, 337 U.S. at 692, n. 11, thereby implying that sovereign immunity is applicable whenever a court order could affect the disposition of sovereign property even if the government official is acting in violation of a mandatory statutory duty. While this Court has not squarely addressed this issue, *see Train* v. *Campaign Clean Water, Inc.*, 420 U.S. 136, 138 (1975), at least one court of appeals has expressed the view that it is "inconceivable that the Court would take such a step without mentioning the rule of those cases or the cases themselves, and

particularly that it would take such sweeping action in a footnote to an opinion which did not involve the point." *Clackamas County* v. *McKay*, 219 F.2d 479, 493 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955). *See also Vishnevsky* v. *United States*, 581 F.2d 1249, 1255 (7th Cir. 1978).

The claims in these cases are based on explicit statutory provisions mandating the payment into the treasuries of the Commonwealth of Puerto Rico and the Virgin Islands of "all taxes collected under the internal revenue laws of the United States" on articles produced in the respective islands and transported to the United States, and, in the case of the Virgin Islands, of "[t]he proceeds of customs duties . . . less the costs of collecting all of said duties." The language of the statutes relied upon is peremptory. No issues of fact or matters of policy are involved. If the statutes embrace the disputed taxes and duties, the Secretary is under a clear duty to deposit the sums collected in the treasuries of Puerto Rico and the Virgin Islands, and he never has suggested otherwise. Only if sovereign immunity bars all suits for mandamus affecting the disposition of federal funds can the claims in this case be deemed jurisdictionally deficient.

b. Nor is there any merit to the Secretary's argument that the Declaratory Judgment Act, 28 U.S.C. §2201, bars these actions. It is well settled that the Declaratory Judgment Act is coterminous with the Anti-Injunction Act, 26 U.S.C. §7421(a), which proscribes suits for the purpose of restraining the assessment or collection of any tax. *Eastern Kentucky Welfare Rights Organization* v. *Simon, supra*, 506 F.2d at 1284-1285; *McGlotten* v. *Connally*, 338 F. Supp. 448, 453 (D.D.C.

1972) (three-judge court). The instant actions clearly are not barred by the Anti-Injunction Act, and hence not by the Declaratory Judgment Act, because they have nothing to do with restraining the assessment or collection of taxes. The Secretary already has assessed and collected the taxes which are at issue. The only questions presented are whether 48 U.S.C. §734 and section 28 of the Revised Organic Act of the Virgin Islands, 68 Stat. 497, require that the taxes which have been assessed and collected be covered into the treasuries of Puerto Rico and the Virgin Islands.

CONCLUSION

The petitions for *certiorari* in Nos. 80-1252 and 80-1253 and the cross-petition in No. 80-1647 should be granted, and writs of *certiorari* should issue to review the judgments and opinions of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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April 17, 1981

CERTIFICATE OF SERVICE

I, Michael J. Henke, attorney for respondent and a member of the Bar of this Court, certify that on this 17th day of April, 1981, the foregoing Brief in Response to Cross-Petition has been served upon petitioner by hand-delivering three copies thereof to David English Carmack, Department of Justice, Washington, D.C., attorney for petitioner, and by mailing three copies, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

MICHAEL J. HENKE

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